Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al., Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture, d/b/a J. W. Bateson Company, and The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Corporation, General Reinsurance Corporation, and The Home Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 28, 1977.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-6a) is reported at — F.2d —, — U.S. App. D.C. —.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 28, 1977. A timely petition for rehearing, or, in the alternative, for hearing *en banc*, was denied on February 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether union trustees, seeking recovery of unpaid fringe benefit funds and union dues, required to be withheld under a collective bargaining agreement from the wages of employees of a sub-subcontractor on a federal construction project, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, where neither the union trustees nor the employees of the sub-subcontractor have any direct contractual relationship with either the prime contractor or a subcontractor of the prime contractor.

2. Whether the Court of Appeals' decision, extending the coverage of the Miller Act to union trustees who have no contractual relationship with either the prime contractor or a subcontractor, which decision is in conflict with the decision of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits, has misinterpreted this Court's opinions in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.* and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*

STATUTE INVOLVED

The Miller Act, 40 U.S.C. § 270b(a), as amended, provides:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

STATEMENT OF THE CASE

1. Material Facts

On or about August 10, 1971, petitioner, J. W. Bateson Company (hereinafter "Bateson"), entered into a written prime contract with the United States of America, acting by and through the General Services Administration, for the construction of an addition to the Howard University Hospital building in the District of Columbia.

On August 12, 1971, Bateson, in conjunction with the other named petitioner sureties, duly executed and delivered to the United States a payment bond (hereinafter "Miller Act bond") in accordance with the provisions of the Miller Act, 40 U.S.C. § 270a, *et seq.*, as amended, in the sum of $2,500,000.00, to protect the class of persons, within the contemplation of the statute, who furnish labor or materials for a government construction project.

Thereafter, Bateson entered into a subcontract with Pierce Associates, Inc. (hereinafter "Pierce"), which subcontract obligated Pierce to perform a portion of the work specified in the original contract between Bateson and the United States. Subsequently, Pierce entered into a sub-subcontract with Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") to provide the materials and labor required to install a sprinkler system in the addition to the Howard University Hospital.

Respondent, Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669") is an unincorporated labor union representing sprinkler fitters employed by sprinkler contractors including Colquitt.

Respondents, Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Auto-

matic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Trustees") are the trustees of the employee fringe benefit trust funds established by the Collective Bargaining Agreement (hereinafter "Agreement") between the National Automatic Sprinkler and Fire Control Association (hereinafter "Association"") and Local 669.

Colquitt is a party to the Agreement. However, Colquitt is not a member of the Association, therefore, it was necessary for Colquitt to separately sign the Agreement in order to be bound by its provisions.

This action involves claims against the Miller Act bond for unpaid fringe benefit contributions and moneys withheld from the wages of the employees of Colquitt during the period May 1, 1973 through December 1, 1973, while said employees were engaged in the installation of a fire sprinkler system at the Howard University Hospital project.

2. The Proceedings Below.

Respondents filed their complaint against petitioners in the United States District Court for the District of Columbia on May 9, 1974 (Civil Action No. 74-699). The basis for jurisdiction in the District Court action as set forth in the complaint was the Miller Act, 40 U.S.C. §§ 270a and 270b, as amended. In response to the complaint, the petitioners filed on May 23, 1974, a motion to dismiss the complaint for failure to state a claim, or, in the alternative, on the ground that the court lacked jurisdiction over the subject matter of the complaint. In their motion, petitioners maintained that respondents lacked standing to sue under the Miller Act, 40 U.S.C. § 270a, *et seq.*, because they had

no contractual relationship with either the prime contractor or with a subcontractor as required by 40 U.S.C. § 270b(a). Respondents filed their response to the motion on June 13, 1974, and petitioners filed a reply to respondent's response on June 18, 1974. On July 3, 1974, the District Court entered an order denying the motion to dismiss. In denying petitioners' motion, the District Court interpreted this Court's opinion in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) to require a holding that Colquitt was a "subcontractor" within the meaning of the Miller Act notwithstanding the fact that Colquitt was a third-tier subcontractor (sub-subcontractor) having no contractual relationship, direct or implied, with the prime contractor.

On July 15, 1974, petitioners filed a motion to reconsider the motion to dismiss, or, in the alternative, to certify the decision for interlocutory appeal. Respondents filed their response to petitioners' motion on July 23, 1974, and on July 26, 1974, the District Court denied petitioners' motion. On August 5, 1974, petitioners filed an answer to the complaint. Six months of discovery efforts by both parties thereafter ensued.

On February 18 1975, petitioners filed a motion for summary judgment, together with a supporting memorandum which set forth three separate grounds in support of the motion: (1) that respondents waived their right to file a claim on the Miller Act bond; (2) that respondents are estopped from filing a claim on the Miller Act bond; (3) that respondents lack standing to file a claim on the Miller Act bond because they had no direct contractual relationship with either the prime contractor or a subcontractor. On March 24,

1975, respondents filed a cross-motion for summary judgment along with two affidavits and a memorandum in support thereof and in opposition to petitioners' motion for summary judgment. Respondents requested the court to grant partial summary judgment with respect to petitioners' liability for the monies claimed. On April 7, 1975, petitioners filed a memorandum in opposition to respondents' cross-motion for summary judgment and on April 17, 1975, respondents filed a reply to petitioners' memorandum. Thereafter, on June 6, 1975, the District Court entered an order denying petitioners' motion for summary judgment and granting respondents' cross-motion for summary judgment.

On July 1, 1975, petitioners entered their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dated June 6, 1975. On September 19, 1975, respondents filed in the Court of Appeals a motion to dismiss the appeal on the ground that the appeal was not within the jurisdiction of the court because the order from which the appeal was taken was neither a final judgment under 28 U.S.C. § 1291, nor an appealable interlocutory order under 28 U.S.C. § 1292, absent proper certification from the District Court. On October 24, 1975, the Court of Appeals entered an order dismissing the appeal Thereafter, the District Court certified its order dated June 6, 1975, for interlocutory appeal by order dated October 29, 1975. On November 4, 1975, petitioners entered their second notice of appeal and on December 10, 1975, the appeal was docketed by the Court of Appeals (No. 75-2199).

After briefs were filed by the parties, the case came up for oral argument before the Court of Appeals on December 9, 1976. On January 28, 1977, the Court of Appeals entered its opinion and judgment affirming the decision of the District Court (App., *infra* pp. 1-). Petitioners thereafter filed a timely petition for rehearing, or, in the alternative for hearing *en banc*, which was denied on February 17, 1977.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals for the District of Columbia Circuit Is Contrary to the Holdings of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits and Other District Courts.

The United States Court of Appeals for the First, Fourth, Fifth and Ninth Circuits [1] have all held that a third tier subcontractor (respondents in this case) is too remote to be entitled to recover on a Miller Act bond.

Except for the holding of one District Court, [2] which holding was expressly rejected by the First, Fifth, and

[1] *United States ex rel. Powers Regulator Co.* v. *Hartford Accident and Indemnity Co.*, 376 F.2d 811 (1st Cir. 1967); *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.*, 271 F.2d 415 (1st Cir. 1959); *United States ex rel. DuKane Corporation* v. *United States Fidelity & Guaranty Co.*, 422 F.2d 597 (4th Cir. 1970); *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F.2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960) *Fidelity and Deposit Co. of Maryland* v. *Harris*, 360 F.2d 402 (9th Cir. 1966).

[2] *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F.Supp. 323 (D.Pa. 1957).

Ninth Circuits, [3] and by other District Courts, [4] the decision of the Court of Appeals for the District of Columbia Circuit stands alone. Interestingly enough, the holding of the District of Columbia Circuit that Colquitt was a "subcontractor" rather than a sub-contractor is even inconsistent with an earlier decision of that Court decided under the District of Columbia mechanics' lien law. [5]

Because of the conflict between the decision in the instant case and the decisions of the First, Fourth, Fifth and Ninth Circuits, and because of the significance and importance of this case to thousands of Government construction contractors on projects involving hundreds of millions of dollars, the writ should be granted. See Rule 19 of the Rules of this Court.

2. The Court of Appeals Misinterpreted the Decisions of This Court.

All of the decisions of the various Courts of Appeals and District Courts cited herein as being contrary to the holding of the Court of Appeals for the District of Columbia Circuit, relied upon this Court's decision in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944).

[3] *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Raff, supra; Elmer* v. *United States Fidelity & Guaranty Co., supra; Fidelity and Deposit Co. of Maryland* v. *Harris, supra.*

[4] *United States ex rel. Newport News Shipbuilding and Dry Dock Co.* v. *Blount Bro. Constr. Co.*, 168 F.Supp. 407, 411 (D.Md. 1958), *United States ex rel. Jonathan Handy Co., Inc.* v. *Deschenes Constr. Co.*, 188 F.Supp. 270, 272 (D. Mass. 1960); *United States ex rel. Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.*, 193 F.Supp. 802, 803 (D. Idaho 1961).

[5] *Battista* v. *Horton*, 128 F.2d 29, 31 (D.C. Cir. 1942).

The issue in *MacEvoy* was whether under the Miller Act a person supplying materials to a materialman of a prime contractor can sue under the Miller Act. This Court held that he cannot. In fact, this Court said in *MacEvoy* that the right to sue on a Miller Act bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give statutory notice of their claim to the prime contractor. 322 U.S. at 107-108. This Court said further that:

> "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso [of 40 U.S.C. § 270b(a)] and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." 322 U.S. at 108.

The limitation recognized by this Court in *MacEvoy* was reaffirmed by this Court in *F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, *supra*, where this Court said:

> "The rights afforded by the act are limited, however, by the proviso of § 270(a). In [*MacEvoy*] this Court construed § 270b(a) to limit protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a 'subcontractor'. Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected." 417 U.S. at 122.

In *Rich*, the prime contractor, F. D. Rich Co., had a direct contractual relationship with Cerpac Co. to supply and install certain millwork and exterior plywood. Cerpac, in turn, ordered its requirements for exterior plywood from Industrial Lumber Co. The issue was whether Cerpac was a "subcontractor" for the purposes of the Miller Act or a mere materialman. This Court applied the "functional" definition of "subcontractor" previously adopted in *MacEvoy* and held that Cerpac was a "subcontractor" and, since Industrial, as a material supplier, had a direct contractual relationship with Cerpac, this Court held that Industrial was protected under the Miller Act.

The Court of Appeals in the instant case has completely misinterpreted the decisions of this Court in *MacEvoy* and *Rich*. Although the Court of Appeals recognized that Colquitt was "technically a sub-subcontractor" (App., *infra*, p. 4a), the Court proceeded to read out of the Act the limitation of the proviso of § 270b(a). Only in this way could it rule that Colquitt was a "subcontractor" rather than a *sub*-subcontractor. Petitioners submit that there is nothing in *Rich* to support the holding of the Court of Appeals that Colquitt was a "subcontractor" notwithstanding the fact that it had no contractual relationship with the prime contractor. Petitioners further submit that the fact that Colquitt performed a portion of the work called for under the prime contract does not make it a "subcontractor" within the common meaning of such term[8] or within the meaning of the Miller Act.

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[8] *Battista* v. *Horton*, *supra*.

3. The Court of Appeals' Interpretation of the Miller Act Is Clearly Contrary to the Expressed Intent of Congress.

The purpose of the Miller Act was to provide protection to those supplying labor or materials to a contractor on a federal construction project. Since a mechanics' lien cannot attach to Government property, an alternate remedy is provided through the procedure of requiring that the contractor furnish a payment bond. The legislative history of the Miller Act makes it clear that the Congress intended to extend the protection of a Miller Act bond only to third tier contractors:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H.Rep. No. 1203 (74th Cong., 1st Sess.), p. 3.

The use of the term "sub-subcontractor" in the Committee Report quoted above negates any contention that Congress intended to extend the protection of the Miller Act bond to the employees of a "sub-subcontractor" or beyond.

4. The Decision of the Court of Appeals Will Upset Traditional Relationships Between Contractors on Government Construction Projects and Result in Increased Construction Costs to the Government.

The Miller Act was enacted in 1935, Act of August 24, 1935, c. 642, 49 Stat. 793. While the Miller Act repealed the Heard Act, 40 U.S.C. § 270, it reinstated the basic provisions of the earlier law and was designed primarily to eliminate certain procedural limitations on its beneficiaries. *MacEvoy Co.* v. *United States, supra.*

Subsequent to this Court's decision in *MacEvoy*, and up until the Court of Appeals' decision in the instant case, the Federal Courts have, with the exception of one singular District Court, interpreted the Act as providing protection only to the third contractual tier. The leading case has been the Fifth Circuit's 1960 decision in *Elmer* v. *United States Fidelity & Guaranty Co., supra.* This Court denied *certiorari* in that case. 354 U.S. 854. Since *Elmer*, millions of dollars of federal construction projects have been let and thousands of contractors and subcontractors on those projects have awarded many millions of dollars of subcontracts and sub-subcontracts in reliance upon, not only the *Elmer* case, but also the decisions of the First, Fourth and Ninth Circuits, as well. To now extend the protection of the Miller Act bond to an ill-defined and indefinite group of "subcontractors" as suggested by the District of Columbia Circuit, will create a situation where it will be impossible to predict who is or is not protected by the Miller Act bond. For this reason, it will now be necessary for each subcontractor to require bonds from each sub-subcontractor on down the line *ad infinitem* to obtain full protection from unknown claimants.

It is no answer to say, as did the Court of Appeals, that Bateson could have protected itself from Colquitt's default. Bateson did require an indemnity agreement and bond from its subcontractor, Pierce. However, Pierce, believing that the protection of the Miller Act did not extend beyond Colquitt, required no indemnity agreement or bond from Colquitt. Had Pierce done so, Colquitt's contract price would have been increased by the amount of the bond premium. The Government would have had to ultimately bear this price increase for

it would have been reflected in Pierce's price to Bateson and, in turn, in Bateson's price to the Government.

The Court of Appeals' decision, and the conflict created thereby, if left standing, will create considerable confusion and uncertainty in an area of law thought to be well settled and will ultimately result in an increase in the cost of construction to the Government.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2199

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL.

v.

J. W. BATESON COMPANY, INC., ET AL., *Appellants*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil 74-699)

Argued December 9, 1976

Decided January 28, 1977

Henry J. Cappello, for appellants.

Donald J. Capuano, for appellees, Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, *et al. Glenn V. Whitaker,* was on the brief for appellees.

Before: WRIGHT and ROBB, *Circuit Judges* and GESELL,*

United States District Judge for the District Court for the District of Columbia

Opinion for the Court filed by *District Judge* GESELL.

Concurring opinion filed by *Circuit Judge* WRIGHT.

GESELL, *District Judge*: This case arises under the Miller Act, 40 U.S.C. §§ 270a *et seq.*, and involves the scope of the payment bond which prime contractors are obliged to provide as surety for work done on federal construction. The

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

District Court, Judge Aubrey E. Robinson, Jr., granted summary judgment on plaintiffs' claim against a Miller Act bond executed by defendant J. W. Bateson Co., Inc., which now appeals. We affirm.

The material facts are not in dispute. In August, 1971, Bateson contracted with the United States to build an addition to the Howard University Hospital. In accordance with the Miller Act. Bateson filed with the Government a payment bond for the protection of those furnishing labor or materials to the project. Bateson, as prime contractor, subcontracted with Pierce Associates for some of the work specified in the main contract. Pierce, in turn, contracted with the Colquitt Sprinkler Co., Inc. for part of this work, the installation of a sprinkler system as required by the contract specifications. Colquitt then signed a collective bargaining agreement covering its workers on the job with the National Sprinkler and Fire Control Association, and Local 669 of that union. Due to financial difficulties Colquitt failed to turn over to the union both fringe benefit funds and union dues which it had withheld from wages of workers on the job, as required by its agreement with the union. The union trustees thereafter notified Bateson they were filing a claim against the Miller Act payment bond for the money owing. When payment was refused suit was brought in the District Court.

The Miller Act, enacted in 1935, requires all Government contractors to execute a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for" in a Government construction contract. 40 U.S.C. § 270a. Like the Heard Act which it replaced,[1] the Miller Act carried forward settled congressional policy to ensure that those who aided in the completion of Government projects would not be financially injured by the default of a contractor who happened to be low bidder for a contract.

[1] The Heard Act, 28 Stat. 278 (1894), as amended 33 Stat. 811 (1905), 40 U.S.C. § 270, required that Government contractors file one bond. If a contractor defaulted the United States could sue on the bond with those who provided materials and labor intervening. But the United States had priority in any recovery. If the United States did not sue, private parties had to wait six months before filing their own actions. The Miller Act was intended to provide greater protection to subcontractors, laborers, and materialmen by requiring two bonds, a performance bond for the Government and a payment bond for private parties, and by shortening the time before suit. See H.R. Rep. No. 1263, 74th Cong., 1st Sess. (1935).

In *MacEvoy Co.* v. *United States*, 322 U.S. 102 (1944), the Supreme Court held that to be a proper claimant under a Miller Act bond one must have furnished labor or materials for a Government project pursuant to a contract with either the prime contractor or a subcontractor on the project. Noting that the Act does not define "subcontractor," the Court adopted a functional definition, stating:

> . . . a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . . .
>
> 322 U.S. at 109.

Later, in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974), the Court endorsed the functional approach of *MacEvoy*. It held that the test for determining whether an entity was a subcontractor was "the substantiality and importance of his relationship with the prime contractor" because where a substantial relationship exists the prime contractor can adequately protect itself against loss. *Rich, supra*, at 123.

A comparison of the results in *MacEvoy* and *Rich* makes this test clear. In *MacEvoy* a supplier contracting with a materialman of the prime contractor could not claim against the bond because he did not have a contract

with a subcontractor or perform any work on the job. However, a similar claim was allowed in *Rich* because while the supplier technically contracted with only a materialman, functionally the materialman was a subcontractor, since he performed part of the original contract and the prime contractor was in a position to protect himself against any loss from the materialman's default. This functional approach emphasizes the view originally taken by the Court in *MacEvoy* when it highlighted the remedial nature of the Act. The Court said:

> The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and aplication in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.
>
> *MacEvoy Co.* v. *United States, supra* at 107.

In the case before us the Union's contract was with Colquitt which was technically a sub-subcontractor. While defendants concede that Colquitt itself could claim under the bonds since it had a contract with subcontractor Pierce, they claim Colquitt's employees cannot because they only had a relationship with a sub-subcontractor. As noted, this formalistic analysis was soundly rejected in *Rich*. The real question is whether Colquitt performed work provided for in the main contract and had such a relationship with prime contractor that the prime, Bateson, could have protected itself from Colquitt's default.' If so, Colquitt is a subcontractor and its employees may claim against the payment bond.

Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when

Colquitt because of its financial difficulties could no longer perform.

The District Court found the relationship between Bateson and Colquitt "substantial and important." This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson.[2] Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. *See MacEvoy, supra* at 110. Colquitt, therefore, was a subcontractor under the Miller Act and the union trustees are proper claimants under the bond. *See United States* v. *Carter Coal*, 353 U.S. 210 (1957).

Appellant also asserts that plaintiffs waived their rights under the bond by not acting against Colquitt, as they might have under their contract, and that they are estopped from asserting their claims. This argument is without merit. *See United States* v. *Glassman Construction Co.*, 397 F.2d 8 (4th Cir. 1968).

Affirmed.

WRIGHT, *Circuit Judge, concurring*: I concur in the judgment of the court in this case. I am also in general agreement with the court's opinion. The Miller Act makes clear that a prime contractor on a public building shall furnish "[a] payment bond with a surety or sureties • • • for the protection of all persons supplying labor and material in the prosecution of the work provided for in said

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[2] Plaintiffs filed a request for the admission of the genuineness of documents "to the extent that they are the Contractor's Weekly Payroll Statements submitted by Colquitt Sprinkler Company, Inc. to the General Services Administration and /or J. W. Bateson Company, Inc. . . ." Defendants apparently never bothered to respond to these requests.

contract for the use of each such person." 40 U.S.C. § 270a (2) 1970). The Miller Act further provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance therof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him[.] * * *

40 U.S.C. § 270b(a) (1970). Thus the congressional intent is "to protect those whose labor and materials go into public projects" because such costs are not recoverable against the United States. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). Whether the labor and materials are furnished directly to the prime contractor or through a subcontractor or a sub-subcontractor is irrelevant as far as the protection provided by the Act is concerned. If the prime contractor wants to protect himself against loss caused by subcontractors, he can "'*secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. . . .*'" *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 123 (1974), *quoting MacEvoy Co.* v. *United States, supra*, 322 U.S. at 110 (emphasis by the *Rich* Court). And if he permits subcontractors to further subcontract, such permission can be made contingent on similar security being provided by the sub-subcontractor.